

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HARRY BURTON

Claimant

VS.

ROCKWELL INTERNATIONAL

Respondent

Self-Insured

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Docket No. 157,261

ORDER

Claimant appeals from an October 25, 1994 Award entered by Administrative Law Judge James R. Ward.

APPEARANCES

The claimant appeared by his attorney, Mark S. Gunnison of Kansas City, Missouri. The respondent, a qualified self-insured, appeared by its attorney, Larry R. Mears of Atchison, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award. The Appeals Board has also reviewed and considered the record listed in the Award.

ISSUES

Claimant challenges the decision by the Administrative Law Judge to apportion the disability and medical benefits awarded pursuant to K.S.A. 44-5a01(d) .

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds that disability benefits should be apportioned and respondent should be responsible for twenty-five percent (25%) of one hundred twenty-five thousand dollars (\$125,000.00) permanent total maximum compensation.

The sole issue to be considered on appeal is whether it was appropriate for the Administrative Law Judge to apportion liability for claimant's occupational disease, between occupational and nonoccupational factors. The Appeals Board, hereby, expressly adopts the findings by the Administrative Law Judge on all other issues adjudicated. For the reasons expressed below, the Appeals Board also agrees with the decision by the Administrative Law Judge to apportion the liability for disability benefits. The Appeals Board finds, on the other hand, there should be no apportionment of liability for medical benefits.

Claimant worked for respondent from 1955 to 1991. Most of this work was as a welder. The work exposed claimant to smoke, dust and fumes of various kinds. The evidence establishes that claimant had suffered an idiopathic adult onset of asthma which was aggravated by the exposure to the dust and fumes at the foundry. Claimant also smoked unfiltered cigarettes at the time he worked for the foundry. As testified to by Dr. Kerby, respondent's physician, the occupational and nonoccupational factors combined to give claimant a functional impairment of thirty percent (30%) of the whole person under AMA Guides. Five to ten percent (5-10%) of this functional impairment is attributable to occupational factors. Dr. Durie agreed that smoking and exposure at work both contributed to development of claimant's lung disease. Dr. Durie testified he could not, however, determine which was the most significant. The evidence also has established that claimant is permanently unable to engage in any substantial gainful employment and is, therefore, permanently and totally disabled. The Administrative Law Judge construed the testimony of Dr. Kerby in light of K.S.A. 44-5a01(d), which provides in pertinent part as follows:

"Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants."

Claimant argues the decision by the Administrative Law Judge erroneously interprets and applies K.S.A. 44-5a01(d), because the statute calls for apportionment of causes of disability, not causes of disease. The Appeals Board agrees that the statute refers to causes of disability. However, the Appeals Board also agrees with the analysis of the Administrative Law Judge. In response to claimant's argument, the Administrative Law Judge stated:

"It appears that the intent of the legislature was to compensate one for only the extent of disablement caused by an occupational disease if the respective causative factors can be determined and applied as a percentage. The word "disability" in this section of the statute appears to refer to the entire disease process contracted by a claimant, part of which is made up of non-occupational factors."

Claimant cites cases from other states where the Courts have distinguished between disease and disability apportioning liability for an occupational disease. It appears, however, that those states define disability only in terms of its effect on employment and earnings. In Manuel Magallanez v. IBP, Inc., Docket Number 160,145, the Appeals Board construed Kansas occupational disease statutes and concluded that claimant was entitled to an award of permanent partial disability based upon functional impairment ratings. The causes of the disease are, therefore, also causes of the disability and the apportionment by the Administrative Law Judge was, therefore, appropriate.

The Appeals Board finds, on the other hand, that nothing in the statute calls for apportionment of liability for medical benefits. In the absence of statutory direction to the contrary the Appeals Board concludes that in cases where the occupational factors have contributed to the disease, the employer becomes fully liable for the medical benefits determined necessary to cure the employee from the effects of the disease.

AWARD

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE in favor of claimant, Harry Burton, and against the respondent, Rockwell International, a self-insured, for a combination of temporary total and permanent total disability as a result of occupational disease in the amount of \$31,250.00, all of which is due and payable in one lump sum less the amount of compensation heretofore paid.

Further award is made that claimant may be granted future medical treatment on application only. The respondent, a self-insured, is liable for 100% of such costs, if awarded.

Reporters' fees are assessed as costs against the respondent and insurance carrier to be paid direct as follows:

Appino & Achten Reporting Service	\$377.50
Metropolitan Court Reporters, Inc.	\$190.00
Correll Reporting Service	\$209.50
Gene Dolginoff Associates	\$994.57

Claimant's attorney is granted a lien against the proceeds of this Award at the rate of 22.5% pursuant to the contract between claimant and McDowell, Rice & Smith, a professional corporation, dated June 10, 1991, which is hereby approved.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark S. Gunnison, Kansas City, Missouri
Larry R. Mears, Atchison, Kansas
James R. Ward, Administrative Law Judge
Philip S. Harness, Director